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Supreme Court of the United States

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. – U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL INSURANCE COMPANY; GERLING AMERICAN INSURANCE COMPANY; AND CONSTITUTION INSURANCE COMPANY,

Petitioners,

vs.

HARRY W. LOW, in his capacity as the Commissioner of Insurance of the State of California,

Respondent.

AMERICAN INSURANCE ASSOCIATION, AMERICAN RE-INSURANCE COMPANY, ET AL.,

Petitioners,

vs.

HARRY W. LOW, in his capacity as the Commissioner of Insurance of the State of California,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE BET TZEDEK LEGAL SERVICES IN SUPPORT OF THE OPPOSITION BY RESPONDENT HARRY W. LOW TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Bet Tzedek, "The House of Justice", is a non-profit, pro bono legal services agency that since 1974 has been providing free, high quality, compassionate legal representation to thousands of low-income residents throughout Southern California. Bet Tzedek provides these services to clients of all racial, religious and ethnic backgrounds and is perhaps the only organization in the United States regularly representing survivors of the Holocaust, completely free of charge, in their efforts to secure reparations for the horrors endured during the World War II era.

Over the past several years, Bet Tzedek has represented more than 1,000 Holocaust survivor clients, all of whom are elderly and poor. Each has been assisted in their efforts to assert claims under German-based reparations programs, United States-based litigation, and other humanitarian relief programs administered by various international funds or governments. With the assistance of more than 400 volunteer lawyers from throughout the greater Los Angeles community, Bet Tzedek's full-time staff is able to provide this unique assistance to this long-suffering community of clients, completely free of charge.

Bet Tzedek's experience has shown that those who are aged, infirm and low-income have the most difficult time

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[1] Pursuant to Supreme Court Rule 37.3(a), Bet Tzedek Legal Services has obtained consent from all parties to file this *amicus curiae* brief. Pursuant to Supreme Court Rule 37.6, Bet Tzedek Legal Services is the sole author of the entirety of this brief and no person, firm or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

accessing the judicial system. This is particularly true for those who may have language barriers, who come from other countries and cultures, and who, due to age and infirmity, are losing some of their mental sharpness. Into these categories fall thousands of Holocaust survivors. Bet Tzedek's Holocaust survivor clients average close to 80 years of age, and each is living below poverty-level standards.

Many of Bet Tzedek's clients have either made claims, or are contemplating the filing of claims, for payment of insurance benefits due under life and other insurance policies purchased by their families prior to the outbreak of World War II. The policies were purchased from, among others, the petitioner insurance companies or their affiliates. Due to the destructive actions of the Nazi regime, those who survived would not escape with possessions or copies of policies. Only the companies can now be expected to have those records. Accordingly, Bet Tzedek's clients have a substantial and material interest in this Court's determination of the issues presented.

Specifically, Bet Tzedek's clients are dependent on the reporting requirements of the statute here at issue, the Holocaust Victims Insurance Relief Act of 1999, California Insurance Code, sections 13800-13807 ("HVIRA"). HVIRA obligates insurers doing business in California to identify all insurance policies sold in Europe during the period 1920-1945 by themselves directly or by their European affiliates.

The statute requires disclosure of the names and last known addresses (or cities of domicile) of the policy holders and the current status of those policies. It is this disclosure provision that is of utmost importance to Bet

Tzedek and its clients. Without the ability to access *truthful* information that is exclusively and uniquely under the control of the petitioner insurance companies, Bet Tzedek's clients have never had, and will never have, the chance to assert claims for benefits their families intended them to have.

More importantly, however, the reporting requirements of HVIRA will finally give Bet Tzedek's aging and infirm clients the opportunity to learn their family histories and truths. Because of the advanced age, indigency and declining health of many of these clients, there is, realistically, only a slim chance that their fifty-year-old claims will yield monetary rewards during their lifetimes. The claimants are passing away and the likelihood they will die before these proceedings conclude is rapidly increasing. In addition, awards from such bodies as the International Commission on Holocaust Era Insurance Claims are slow in coming and meager in amount.

Consequently, rising in prominence in survivors' lives is the possibility of finally uncovering truths, finding peace in their histories and salvaging some measure of justice by securing information that has been so long withheld. Receipt of this information by survivors will be, by itself, the culmination of a lifetime of waiting – waiting for acknowledgment that they and their families were right in their quest for benefits and that their determined fight for justice may finally, at least in part, be realized. The benefits of this, alone, are immeasurable.

While some survivors may, as a result, ultimately end up receiving some small economic benefit to help ease the poverty of their final days, the most that many can hope for at this point is the salvation found in the discovery of

information that has been hidden from them for a lifetime. Because of the importance of this issue, Bet Tzedek and its clients have a deep interest in ensuring that all applicable legal and equitable considerations and arguments pertinent to these matters have been presented to the Court.

SUMMARY OF ARGUMENT

The further attempts by the petitioner insurance companies to prevent the implementation of HVIRA will have tragic consequences. The advanced age and infirm, impoverished condition of the vast majority of Bet Tzedek's Holocaust survivor clients is such that many will not survive the months it will take to complete the Court's review process. The plain and simple fact is that the longer implementation of HVIRA is delayed the fewer claimants the petitioners will ever have to deal with. The result will be that many will die never having had the chance to uncover or assert the rightful claims, or learn the truths, that their families bequeathed them.

As has been twice decided by the Ninth Circuit Court of Appeals, the petitioners are incorrect in asserting that HVIRA's straightforward reporting requirements run afoul of the foreign affairs powers of Congress or the due process clause of the Constitution. In assessing the thorough explication of these issues by the court below, equity demands that because further delay will be fatal to many long-suffering claimants, the well-reasoned opinions of the Ninth Circuit should stand and the current writ of certiorari should be denied.

ARGUMENT

I. INTRODUCTION

It is well established that in order to best protect its citizens, the State of California must have the authority to enact measures such as HVIRA. The clients of Bet Tzedek depend on the state's sovereign power to assert the rights of voiceless people so long ignored. In regulating the insurance industry operating within its borders, California is protecting the contractual rights of its own citizens in regard to businesses over which the state unquestionably exercises regulatory authority.

In seeking to exercise that authority, California has enacted a measure that conforms with public policy by assuring that insurance companies operating in the state do so in a responsible manner. The California legislature has determined that insurance companies doing business in California are fit to continue serving the people of the state *only* if full and truthful information is made available to the families of their policy-holders (or the policy-holders of their affiliates) who died in the Holocaust. The state's goal is to protect its citizens from companies that continue to withhold legitimately-needed policy information from aged, infirm survivors of one of history's great atrocities. By requiring the reporting of nothing more than truthful information, California is operating well within the bounds of the Constitution and is, in fact, promoting equity and justice.

II. EQUITY AND JUSTICE REQUIRE THAT THE WRIT OF CERTIORARI BE DENIED AND THAT ELDERLY HOLOCAUST SURVIVORS BE GIVEN THE CHANCE TO RECOVER TRUTHFUL INFORMATION AS SOON AS POSSIBLE

The delay engendered by a proposed granting of petitioners' writ of certiorari will have tragic consequences. Already, a number of Bet Tzedek's elderly, indigent Holocaust survivor clients have died without ever having had the opportunity to find out if their families' histories included an effort to care for them after their parents were brutally murdered for simply being Jewish. Unless HVIRA is enforced, the companies controlling the dissemination of this information will go unchecked, free to withhold information and policy benefits that rightfully belong to those who have already suffered. And the longer the companies are able to delay making these simple disclosures, the longer their actions remain unregulated, the more people will pass away while waiting for truths and acknowledgments that seemingly will never arrive.

Access to policy information may, hopefully, be of at least some economic benefit to a survivor in the long run, should he or she live long enough to pursue a valid claim. Easing the pain of poverty in one's final days is a benefit that should never be minimized. More likely, however, are the short-term non-economic benefits that will be foreclosed by a grant of a writ of certiorari.

Non-monetary benefits such as the search for family histories and truths, acknowledgment of past suffering and prior wrongs, personal satisfaction and dignity are not only legitimate, but crucial considerations in a court's assessment, if a court decides to engage in a balancing of relative hardships. *See, e.g., Chalk v. United States District Court*, 84

F.2d 701, 709 (9th Cir. 1988). For instance, a survivor may gain great personal satisfaction in being able to finally fulfill a promise to a parent to track down the parent's insurance policy should the survivor escape the Nazi death camps. This promise continues to haunt many survivors to this day. A survivor may experience joy in discovering a history that demonstrates a family member's efforts to provide for his or her future. Finally, recovering a piece of ones family history may restore to one a sense of dignity and peace, and perhaps be the first step towards some relief from the poverty that afflicts many a survivor's last days.

Additionally, further delay in enforcing the registry provisions of HVIRA, "even if only for a few months . . . represents precious, productive time irretrievably lost" to a survivor seeking information on her or his family's Holocaust-era insurance policy. *Chalk*, 840 F.2d at 710. Access to policy information may help an elderly survivor establish the validity of a claim, particularly a claim already submitted to, but not yet accepted by, the International Commission on Holocaust Era Insurance Claims ("ICHEIC") – the very body established by several of the very insurance companies now seeking this writ of certiorari.

HVIRA plainly does not regulate the payment of monetary claims nor does it require the payment of monetary claims. If, however, with the information garnered, the survivor is able to successfully pursue a claim, he or she may ultimately realize some economic benefit in the form of a monetary award or settlement. If he or she survives long enough to see the claims process through to its conclusion, the money may be used to relieve the suffering associated with age, infirmity and indigence. If, however, the writ is granted, many survivors will die during its pendency. Lost forever will be the chance to see any

benefit, monetary or not, from the release of truthful, accurate information, long withheld by the insurance companies, about the survivor's own past. "[I]t is not only the claims-handling practices of 50 years ago that are at issue, but also the current and continuing failure of California-licensed insurers and their foreign affiliates to disclose information about any outstanding potentially valid claims." *Gerling Global Reinsurance Corp. of America v. Low*, 296 F.3d 832, 847 (9th Cir. 2002).

Lopez v. Heckler, 713 F.2d 1432 (9th Cir. 1983) offers an ominous warning about the perilous condition of many Holocaust survivors residing in California. Although the present case does not involve the deprivation of government disability benefits dealt with in *Lopez*, the language about the effects of lengthy delays is instructive:

> [They] are largely infirm and disabled, their resources and life spans are by definition extremely limited. Deprivation of benefits pending trial might cause economic hardship, suffering, or even death. Retroactive restoration of benefits would be inadequate to remedy these hardship.
>
> . . .
>
> It is not only the harm to the individuals involved that we must consider in assessing the public interest. Our society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges. . . . It would be tragic, not only from the standpoint of the individuals involved but also from the standpoint of society, were poor, elderly, disabled people to be wrongfully deprived of essential benefits for any period of time.

Lopez, 713 F.2d at 1437.

III. WHEN WEIGHED AGAINST THE TRAGEDIES OF DELAY, THE WEAKNESS OF PETITIONERS' LEGAL ARGUMENTS DEMAND THAT THE PETITION FOR WRIT OF CERTIORARI BE DENIED

By further delaying the implementation of HVIRA, more and more indigent Holocaust survivors will pass away before ever having the chance to learn the truth about their families, much less assert reparations claims. When that urgency is balanced against the unlikely prospect of petitioners' success on the merits of their position, it becomes all the more apparent that the requested writ should be denied forthwith and that California should be permitted to assert its sovereign power to protect its citizens from unjust business practices.

A. HVIRA Does Not Violate the Due Process Rights of Petitioners

Under the California Administrative Procedures Act, all proceedings will be conducted in accord with recognized procedural safeguards, including hearings before an administrative law judge. Cal. Government Code sections 11370-11529. No remedies for violation of HVIRA will be meted out unless and until an allegedly offending insurance company has had the opportunity for a full and fair hearing under the well-established procedures of the California Administrative Procedures Act.

It should also be noted that it was within the clear contemplation of the contracting parties that enforcement of the subject insurance policies would likely occur in a foreign jurisdiction such as California. Many of the subject insurance policies issued by the petitioner insurance companies

expressly agreed to cover the insured worldwide (obviously encompassing enforcement in California). Some even had a clause permitting changes of residence and travel throughout the world, and all policies had implicit in their terms a promise to pay the policy benefits wherever the insured or his/her beneficiary resided at the time a claim was to be made. In such circumstances there can be no doubt that application of HVIRA to the petitioners, each doing business in California, is entirely fair and is wholly consistent with due process. *Clay v. Suns Ins. Office, Ltd.*, 377 U.S. 179 (1980).

The application of California law to the actions of businesses operating within its borders is eminently fair. The purpose of HVIRA is simply to set out reasonable conditions, protective of the interests of California residents, under which foreign-based insurance companies must produce information in order to lawfully continue to conduct business in California. *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981).

In the instant case, HVIRA does no more than regulate conduct taking place in the state, empowering California to legitimately exercise its authority over the companies in question. The companies' presence in California gives the state an interest in regulating the companies' insurance obligations to the extent that California residents are affected. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 317-318 (1981). Each of the involved companies is licensed and doing business in California, the class of people to be benefitted are California residents, the insurance contracts contemplated enforcement worldwide, and all licensing decisions are made with proper administrative hearings and procedural safeguards. With all these

factors in place, the ability of California to fashion reasonable remedial relief for its Holocaust survivor citizens is more than fair. If California is unable to act despite these protections, then the delays engendered by a granting of the petition for certiorari will simply lead to more tragedies.

B. Enforcement of HVIRA Does Not Interfere With the Foreign Affairs Powers of the United States

HVIRA regulates only private companies licensed to operate in California. It neither has an impact on, nor purports to have an impact on, any foreign government. Furthermore, despite the passage of HVIRA and the rulings of the Ninth Circuit upholding its terms, all international settlement processes continue to operate without interference. In fact, Bet Tzedek clients submitted claims to ICHEIC and to the German Foundation. These procedures are marching forward, unabated by the actions occurring in California. In truth, Bet Tzedek clients need the benefits of the HVIRA disclosure provisions in order to effectively participate in the ICHEIC claims process or otherwise assert rightful claims. Consequently, the enactment of HVIRA demonstrably has had no effect on the exercise of the United States' foreign affairs activities.

C. HVIRA Is Markedly Different in Substance from a Florida Statute and, Consequently, There Is no Conflict Among the Circuits

In Florida, a statute was passed which purported to exercise the authority to require European insurance

companies, even those not doing business in the state, to pay claims in a timely manner. In contrast, the Ninth Circuit has twice held that HVIRA is a reporting statute only, the aim of which is not to force the payment of claims, but simply to regulate the conduct of businesses licensed to operate in California. Consequently, the decision in *Gerling Global Reinsurance Corp. of America v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001) is not relevant here and there is no conflict between the circuits.

Because it is highly unlikely that HVIRA constitutes a deprivation of due process, interferes with foreign affairs, or would stand in conflict with other circuits, the legitimate interest of California in protecting its citizens stands paramount. The state has an overriding interest in protecting its citizens from companies whose out-of-state business practices call into question a company's integrity and fitness to serve the people of California. More specifically, with one of the largest populations of Holocaust survivors anywhere in the world, California has long demonstrated a deep interest in assuring that this unique community of citizens is treated fairly. Providing truthful information to people who have waited more than 50 years for nothing more than that is a legitimate, if not an overriding, state interest. It is an interest that far outweighs the dubious legal claims of companies whose goal seems to be keeping the truth away from those whose lives have been immeasurably affected by the withholding of simple facts.

IV. CONCLUSION

California has continued to be a national leader in exercising its sovereignty on behalf of the poor and powerless. HVIRA is an example of the way in which the people

of the state of California have established admirable public policy that seeks to assist thousands of citizens in their frustratingly long search for truth and justice. As Holocaust survivors near the end of their days, many are sick and many are poor. They share a common bond of tragedy and powerlessness. Today, California seeks merely to empower the most voiceless, giving them the chance to finally find truths and justice.

With all the protections afforded by the Constitution, California has balanced the needs of its most vulnerable and unique citizens with the respect due its business community. The result is HVIRA, a statute whose regulatory goal is the disclosure of truthful information. The measure protects the due process rights of the affected companies while effectively exercising the state's regulatory responsibilities. Consequently, the harm to a community of needy clients that will potentially result from a further delay in implementing HVIRA far outweighs any manufactured need to revisit the well-reasoned opinion from the court below.

On behalf of its elderly, indigent and long-suffering Holocaust survivor clients, *amicus curiae* Bet Tzedek, "The House of Justice", respectfully requests that the subject petition for writ of certiorari be denied.

Respectfuly submitted,

DAVID A. LASH